**Globe Security Systems, Inc. *and* Shelly Blum.** Case 11–CA–12978

February 28, 1991

## DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On February 28, 1990, Administrative Law Judge Irwin Kaplan issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Globe Security Systems, Inc., Cornelius, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent contends that the judge's rulings and his conduct at the hearing demonstrated bias against the Respondent. We disagree. Our review of the record reveals no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated any bias.

The judge's decision contains errors of fact that do not affect our decision. We make the following corrections: (1) Gene McDonald was employed in the Respondent's corporate offices and was not assigned to the Respondent's McGuire station; (2) Sergeant Thomas Hinson and not employee Stephen Hartman was asked about employees Thomas Bivins' involvement with Captain Thomas Bone's phone mail at Hartman's September 16, 1988 unemployment compensation hearing; and (3) Bone raised the question of Hartman's petition during a telephone call to Margaret (Mickey) Anderson a few days after the September 16, 1988 unemployment compensation hearing.

[2] Member Oviatt agrees that the Respondent unlawfully discriminated against Steven Hartman by discharging him while only suspending a similarly situated employee Thomas Bivins. He does not agree, however, that making Hartman ''whole'' requires rescinding all discipline. Given that the crux of this case is disparate treatment, Member Oviatt concludes that the proper remedy is for Hartman to receive the same punishment that Bivins received, a 3-day suspension without pay. See generally *South Central Bell Telephone Co.*, 254 NLRB 315 (1981), *Miller Brewing Co.*, 254 NLRB 266 (1981), and *Bethlehem Steel Corp.*, 252 NLRB 982 (1980).

Contrary to Member Oviatt, Members Cracraft and Devaney agree with the judge that the Board's traditional ''make whole'' remedy is appropriate to remedy the Respondent's unlawful discharge of Steven Hartman. The cases relied on by our colleague represent the view of former Chairman Fanning only, and he expressly based his limitation of the remedy in those cases on the fact that the violation alleged and found was that the respondents imposed a ''*greater* discipline'' on union stewards than that imposed on rank-and-file employees who also participated in unprotected walkouts. The present case, unlike those cases, does not involve an allegation of disparate treatment; rather, the evidence of disparate treatment supports the judge's finding that Hartman's discharge was unlawful.



*Jasper C. Brown Jr., Esq.*, for the General Counsel.
*Larry J. Rappoport, Esq. (Kleinbard, Bell & Brecker)*, of Philadelphia, Pennsylvania, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

IRWIN KAPLAN, Administrative Law Judge. This case was heard in Concord, North Carolina, on May 24 and 25, 1989. The underlying charges giving rise to this proceeding were filed on September 29, 1988, and amended on October 20, 1988. These charges and amended charges gave rise to a complaint and notice of hearing dated November 10. 1988.

The gravaman of the complaint is that Globe Security Systems, Inc. (the Respondent or Globe), discharged employees Stephen Hartman and Joyce H. Benoist, on or about August 3 and September 27, 1988, respectively, because the employees engaged in protected concerted activities and that the Respondent thereby violated Section 8(a)(1) of the National Labor Relations Act (the Act).

The Respondent filed an answer conceding, inter alia, jurisdictional facts and the supervisory status of certain individuals but denying that it committed any unfair labor practices. In essence, the Respondent contends that it discharged Hartman and Benoist for wrongfully intercepting telephone messages intended only for a high ranking company official.

On the entire record, including my observation of the demeanor of the witnesses, and after careful consideration of the Respondent's posttrial brief and General Counsel's closing argument, I make these

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent, a Delaware corporation, provides security guard services for Duke Power Company, its largest client, at two nuclear power stations, including the McGuire Nuclear Station in the State of North Carolina, the location involved here. In connection with the aforenoted business operations, the Respondent has, during a representative and material 12-month timeframe, performed services valued in excess of $50,000 for clients, such as Duke Power Company, which in turn are directly engaged in interstate commerce. It is alleged, the Respondent admits, the record supports, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

#### II. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *Background and Sequence of Events*

As noted above, Globe is engaged in the business of providing security services. Globe has been providing security guard services for Duke Power Company (Duke), its largest customer, since 1972. Duke owns and operates nuclear generating facilities at the McGuire Nuclear Station (McGuire, the facility involved here) and the Oconee Nuclear Station (Oconee) both of which stations are serviced by Globe. The security staff employed by Globe, at McGuire, consists of approximately 145 uniformed employees, comprised of a captain, 5 team lieutenants, 2 staff lieutenants, and the remainder, security officers. Captain Thomas Bone is the senior or highest ranking Globe official at McGuire. He reports

to Margaret (Mickey) Anderson, the nuclear manager at Globe's Charlotte office.

Stephen Hartman and Joyce Benoist, the alleged discriminatees, were both employed as security officers at McGuire. Hartman was employed by Globe from June 15, 1981, until August 3, 1988, at which time he was terminated. Benoist was employed by Globe from December 17, 1984, until September 27, 1988, when she was terminated. According to Respondent, Hartman and Benoist, were both terminated for essentially the same type of misconduct: an unauthorized use of the phone mail system at McGuire in intercepting Captain Bone's messages after gaining access to his private or secret code.

In 1987, Duke installed a new telephone system for its key personnel which included a phone mail system. Captain Bone was the only Globe official to have a private or secret access code in the new phone mail system at McGuire. This permitted Captain Bone to receive private messages from ranking Duke and Globe officials including Anderson as well as from family members. Basically, the new system worked as follows: On those occasions when the captain was away from his desk, the phone call would roll over after the fourth ring into the phone mail system, from which the captain could retrieve the message by using his secret access code. Captain Bone was given an hour or two of instruction on how to use the new system at the time it was installed. According to Captain Bone, he was unaware that any Globe employee had gained access to his secret code until he read a note which was left for him by Shift Lieutenant Steve Sellers on the morning of August 1, 1988.[1] That note stated, inter alia, that Team Sergeant Thomas Hinson told Sellers that on August 1 that officer Hartman had listened in on Captain Bone's phone mail. (R. Exh. 6.) At that same time, Captain Bone also read Hinson's account of the incident in a separate statement which Sellers had left along with his own note for the captain. (R. Exh. 5—These notes or statements were typed the following day and dated August 2.)

It is undisputed that Hartman intercepted Captain Bone's phone mail by using the latter's private access code on August 1 in the presence of Hinson. The incident occurred at approximately 5 a.m. on August 1, approximately 1 hour before the shift change. Hinson had just come into the security office area (SOA) when he noticed Hartman. As Hinson moved closer to Hartman, the former heard and recognized the voice of Gail Addis, Duke's superintendent of administration and station coordinator, which was coming from the speaker phone with a message for Captain Bone. The SOA is used, inter alia, as a meeting area and also for breaks and as a lunchroom. No one else was in the area at the time. Hartman then pressed a button and deactivated the speaker which also terminated the call. As described by Hinson, ''[Hartman] was almost in hysterical laughter.'' Hinson questioned Hartman as to what he was doing and the latter readily admitted that he accessed ''the Captain's personal security code.'' Hinson also testified that he told Hartman that it was illegal but the latter denied any illegality asserting that he had checked it out. Hinson left the SOA to look for his immediate superior, Lieutenant Sellers, to report the incident. (Tr. 273–280.)

[1] All dates are in 1988, unless otherwise indicated.

According to Hartman, on the occasion in question, when Hinson entered the SOA, Hartman invited him to listen to the recorded call. Hartman testified that Hinson had listened to messages from other access codes and ''it didn't seem like there was any harm in him listening to it.'' (Tr. 232.) According to Hinson, he had no prior knowledge as to whether any employee had used the phone mail system. (Tr. 284.)

On August 1, Captain Bone, after reading the statements left by Sellers and Hinson regarding Hartman's intrusion into his phone mail, immediately commenced an investigation. He telephoned Sellers and Hinson for more information and alerted Anderson at her Charlotte office that he would be looking into the matter. Further, he had Hartman placed on administrative hold and his duties suspended until arrangements could be made for Hartman to come to the captain's office to give his account of the phone mail incident. Thus, Hartman met with Captain Bone on August 2. No one else was present.

At the August 2 meeting, Hartman admitted using Captain Bone's private access code. Bone asked Hartman how he acquired the access code but Hartman was unwilling to divulge the source. As for the particular incident, Hartman told Captain Bone that he had received a call from someone (Benoist, but unnamed at that time) suggesting that he listen to a message for the captain which also concerned Hartman. As noted previously, that message was from Gail Addis of Duke. It was about an investigation involving another officer on an unrelated matter and Addis was informing the captain about scheduling several employees for interviews, including Hartman, although the latter's name was not expressly noted in the message. Addis wanted Captain Bone to furnish a roster of their hours. Hartman told Captain Bone at this meeting that he (Captain Bone) would be surprised to learn how many of the staff at McGuire had access to his private code. Captain Bone noted his disappointment that Hartman had gained entry into his phone mail and that he would probably get back to Hartman the following day. Hartman acknowledged that he used bad judgement. (Tr. 239.) In the meantime, Captain Bone continued to keep Hartman on administrative hold.

The next day, August 3, Captain Bone met with Anderson at her Charlotte office and recommended that Hartman be terminated. He told Anderson that he had discussed the matter with other members of the staff and had found nothing to indicate that anyone else had entered his personal phone mail system. According to Captain Bone, Anderson did not agree or disagree but contacted legal counsel, Joseph Dych, and one or two other high ranking Globe officials. After Hartman's file was reviewed, these other Globe officials agreed that Captain Bone could terminate Hartman. That same day, Captain Bone telephoned Hartman and told him that he was terminated because he had entered his phone mail which was an unauthorized use of the phone mail system.

Captain Bone also told Hartman over the telephone on August 3, that he was ''a good security officer'' and that he ''hated'' to have to discharge him. Further, the captain told Hartman that in his opinion, had the latter ''channeled his energies into other directions and been more cooperative, he could have been, probably, a lieutenant by now.'' (Tr. 337.) Captain Bone testified that Hartman asked him if the decision to terminate had anything to do with his complaint as

to wages and hours[2] and the backpay that Globe had to pay its employees and the captain responded that he was unaware that Hartman had been involved but in any event, he did the right thing because everyone should be paid correctly. (Id.) Hartman was told that he would have to discuss any recourse rights with Lieutenant Jones and anything that he wanted to put in writing would be directed to Gene McDonald (the highest ranking Globe official at Duke's nuclear stations).

After Hartman was told that he was terminated, Captain Bone met with Anderson and they prepared a notice to all security members regarding Hartman's use of the captain's ''private code number to access his personnal [sic] messages from the phone mail system.'' (Hartman's use was not specifically named, although reference was made to the discharge of a security officer.) (R. Exh. 8.) Anderson, in the notice, pointed out that this was a serious offense and that management considered such use of phone mail as a ''violation of trust and an invasion of privacy related to confidential telephone conversations.''

On September 6, Hartman had a so-called recourse meeting with McDonald and Anderson at the Charlotte office. (Under the Company's policy, an employee is permitted to request such a meeting in writing within 2 weeks after a discharge.) Hartman gave his account of what he and Hinson said to each other back on August 1 with regard to the phone mail. Anderson asked Hartman if he would disclose the names of other security members who were misusing the phone mail. Hartman indicated a willingness to point to such individuals on a roster but he did not want to name anyone. He explained that if he named names he was fearful of missing some individuals. McDonald wanted to know whether Hartman knew directly that other security employees had misused the captain's phone mail or only so rumored. According to Anderson, Hartman did not respond nor did they press him on this issue. (Tr. 408–409.) Hartman wanted to know if the discharge had anything to do with the wage and hour complaint which he filed. Anderson stated that she had no idea who filed the complaint and added that the Company would want to pay its employees properly. McDonald advised Hartman that he would get back to him if the Company changed its position on its decision to terminate him.

The next time the Respondent saw Hartman was at his unemployment hearing on September 16. Hartman was at this hearing on an appeal from a denial of unemployment benefits and was represented by Shelly Blum, an attorney; the Respondent's team included its attorney, and Gene McDonald, Mike Moylan (Anderson's assistant), Captain Bone, and Sergeant Hinson. Blum argued that Hartman was wrongfully terminated because he had circulated a petition among security personnel which took issue with the Respondent's new pay system and in particular, the new pay stubs. That petition contained the signatures of 58 employees at McGuire and at the top of the list was Hartman's name. (G.C. Exh. 2.) According to Captain Bone, prior to this hearing, he had not seen the petition nor had he had any knowledge of its existence and he was shocked that it had not come to his attention. (Tr. 344–345.) At the hearing, Hartman recounted the circumstances entering the captain's phone mail including the words he and Hinson exchanged on the occasion in question. In doing so, Hartman, when questioned, identified Joyce Benoist, for the first time, as the person who had given him the information to access the captain's phone mail. Hartman was then asked whether Hinson was aware of any other security officer who had accessed the captain's code to gain entry to his phone mail and Hartman named officer Thomas Bivins. (The testimony of Bivins and Hinson is in conflict with the former asserting and the latter denying that Hinson was told of Bivins' entry into the captain's phone mail.)

After the unemployment hearing, Captain Bone telephoned Anderson to advise her of the two new names (Benoist and Bivins) that had come up regarding employee access to his phone mail. Captain Bone told Anderson that he had not known of the petition and asked her how long had she had it. Anderson indicated to the captain that she had it for some time. (At the instant hearing Anderson testified that she had received the petition in late January or early February 1988.) According to Captain Bone, he should not have been bypassed and should have been told previously about the petition, particularly since there had been so many problems or employee complaints about the new pay stubs at McGuire.

Bivins and Benoist were both summoned to appear at the Charlotte office for separate interviews on the next duty day which was Monday, September 19. Captain Bone had their files which he had taken from McGuire to Charlotte. The management officials at these interviews were Anderson, her assistant, Moylan, and Captain Bone. At Bivins' interview, Anderson asked him if he was familiar with the Hartman situation and Bivins responded in the affirmative. Anderson told Bivins that Hartman was terminated because of an unauthorized use of the captain's code and inquired of Bivins if he thought the punishment was too strict. Bivins again responded in the affirmative stating that he understood this to be Hartman's first offense. Anderson told Bivins that he had been summoned to Charlotte to be questioned because Hartman identified him at his hearing as also having used the captain's access code. Bivins admitted doing so and asserted that the practice was widespread.[3] He represented that he had accessed the captain's code on only two occasions and he did so only out of curiosity. Anderson asked Bivins if doing so was the same as computer fraud or like opening up someone's mail. Bivins did not agree that there was a connection or that he did anything wrong. Bivins also noted that he told Hinson that he had listened to the captain's phone mail. (Tr. 50–51.) Anderson, Moylan, and Captain Bone pressed on about moral rights and the Bible and punishment Bivins faced from ''higher places.'' (Tr. 46–49.) At some point, Bivins backed away and acknowledged to management that he had invaded the captain's privacy and he apologized. (Tr. 53–54.)

During this meeting with Bivins, Captain Bone held up a folder and the petition (G.C. Exh. 2) and asked Bivins, ''Why would you think somebody would resort to getting up a petition?'' Bivins stated that he did not know and noted that his name wasn't on it and had not seen the document. (Tr. 49–50.) Anderson explained that the petition was about the changes on the pay stubs; however, she also informed

[2] *Hartman's* complaint regarding wages and hours will be treated more fully infra.

[3] While *Bivins* told the company officials that the practice of intercepting phone messages was widespread, it became clear that *Bivins* was confused between the private code of *Captain Bone* (Code 666) and the general code (Code 111) for department heads and their employees to receive messages. (Tr. 46, 63–65; see also *Captain Bone's* testimony (Tr. 349).)

Bivins that these changes were saving the Company $1200 a month at McGuire. Bivins opined that a petition was not a good idea noting that in the past, petitions were not productive. According to Captain Bone, he introduced the subject of the petition at this meeting because he was upset that the employees had bypassed him in the chain of command and he wanted to find out their reasons. (Tr. 351.) Bivins was told to return to work and that he would hear from the Company later.

Benoist was next interviewed by the same management officials. (She, unlike Bivins, was one of the signatories to the employee petition opposing the Respondent's changed pay stubs.) At the outset, Anderson told Benoist that her name had come up at Hartman's unemployment hearing in connection with access to Captain Bone's phone mail. Benoist readily admittted access to the captain's code. She also confirmed Hartman's account that she had informed him of Addis' message to Captain Bone which at least in part pertained to Hartman. Anderson asked Benoist if she understood the seriousness of her actions. Benoist stated that she didn't think there was anything wrong with what she did calling it ''recreational.'' She explained that she would listen to such phone mail when there was little else to do at the station. (Tr. 123.) Anderson testified that Benoist also pointed out in explaining her actions that at times ''she became quite bored and that the job was very tedium [sic].'' (Tr. 419.) Benoist confirmed that she thought that at least part of her responsibilities were boring and that ''maybe I did express it [the way Anderson testified].'' (Tr. 124.) Anderson, who did virtually all the questioning to that point, had to leave for a dentist appointment and left the remainder of the interview to Moylan and Captain Bone.

Benoist testified that after Anderson departed, she apologized to Captain Bone for using his access phone. Moylan asked her if she knew of others who had used the access code. Benoist said that she did but did not want to disclose their names because she didn't want to get anyone else into trouble. She asked Moylan whether she still had a job. (Benoist had been summoned for this interview while she was on vacation.) Moylan told her to finish her vacation and report for work the following Monday.

On Monday, September 26, Benoist reported to work as instructed by Moylan. She was scheduled to have her annual physical that morning. However, Benoist was told by Lieutenant Ludwig that she was temporarily relieved of her duties. The next day, Benoist went to the Charlotte office where she met with Anderson, Moylan, and Captain Bone. Anderson told Benoist that she was terminated. According to Benoist, in noting the reasons for her discharge, Anderson linked her to a conspiracy with Hartman; that she had an attitude problem calling the job boring; and, that she had been suspended earlier in the year for 3 days without pay for not fulfilling her security responsibilities. (R. Exh. 3.)

Bivins was suspended for 3 days without pay. According to Anderson, before any decision was made for either Benoist or Bivins, the matter was also discussed with McDonald and Attorney Joe Dych. Dych assertedly recommended only a 7-day suspension for Benoist because of a fear that she would file EEOC charges for ''female harassment.'' (Tr. 422.) As for Bivins, management concluded that he was contrite, confused, and did not know ''exactly what he was doing when he dialed into the system.'' It was also noted that there was nothing in Bivins' file to indicate any previous discipline. (Tr. 422–424.) Anderson contacted Craig Fish, Addis' assistant at Duke, and told him of Attorney Dych's views. According to Anderson, Fish stated that Benoist was no longer trustworthy, and that Duke would not permit her to work as a security guard at the station. (Tr. 425.) As for Bivins, Fish's views were assertedly the same as Anderson's and he would continue to allow Bivins access to McGuire. (Id.)

According to the General Counsel, Hartman and Benoist were terminated, unlike Bivins (suspended for 3 days without pay), because they were involved in the employee petition and other protected concerted activities. As described below, Hartman had long been active in challenging the Respondent in matters dealing with wages, hours, and terms and conditions of employment. Benoist's activities had been largely confined to matters related to the pay stubs and the related employee petition.

During 1984 and into 1985 Hartman questioned the accuracy regarding the Company's practice of paying overtime and shift differentials and communicated his views on this subject to many of the employees. Hartman testified as follows:

> I talked with numerous other employees and told them I felt that what I'd like to do is go down and take this case before the wage and hour and I said, you know, would you people be behind me and everyone that I talked to said yes, they would be glad for me to go down there [Tr. 160].

Sometime around mid-1985, Hartman went to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, in Charlotte, North Carolina, to discuss the Respondent's payment of overtime. Hartman spoke with William LoPresti, compliance officer, and an investigation was commenced. As testified by Anderson, she first learned about the wage and hour complaint around April 1986 when she heard from LoPresti on the telephone. Anderson denied that she knew or surmised that Hartman was responsible. She testified that LoPresti told her that it was the agency's policy not to disclose the name of the charging party. LoPresti persuaded Anderson that the Company's method for computing overtime was incorrect. As a result the Respondent reimbursed its employees at McGuire a total amount of $15,831 and its Oconee employees a similar amount. (R. Exh. 14.) By letter dated January 15, 1987, the Respondent received notice from the Wage and Hour Division that it had evidence that all the employees had been reimbursed and that the matter was closed. (Id.)

In early 1986, Hartman complained about the Respondent's disciplinary policy which led to a meeting at the Charlotte office with John Collins, then distinct manager, Captain Bone, and Lieutenant Bobby Martin. Hartman testified, without contradiction, that, at the outset, Collins noted that Hartman was a ''fine security officer'' and that up until that point he had done an ''excellent job.'' However, Collins added, that the Company could not countenance memos like the one he typed on the subject of harassment. Collins then showed Hartman his memo and remarked, ''But things like this [the memo], we cant have. When ball cutting time comes, you'd be out on that limb by yourself.'' (Tr. 163–

164.) At the instant hearing, Captain Bone did not question Hartman's account of Collins' warning. (Tr. 369.)

In September 1987, Hartman met with Anderson to dispute the Company's method of computing weighted holiday pay. Hartman testified that he was encouraged by other employees to take up the matter with Anderson. It is undisputed, that Hartman told Anderson that he rather work the problem out with her than through Wage and Hour. (Tr. 168, 434.) They spent approximately 1-1/2 hours going over figures and Anderson finally concluded that Hartman was correct and some adjustment was in order. By memorandum dated September 10, 1987, all security personnel at both the McGuire and Oconee Nuclear Stations were notified of the adjustment to correct payroll errors since May 1986. (R. Exh. 4.)

In January 1988, the Respondent issued new abbreviated pay stubs. This new method did not delineate or disclose, inter alia, shift differentials, and regular pay from nuclear premium pay and holiday pay. Instead, all hours worked were combined and the grand total noted. The new stubs created much confusion and made it difficult for employees to calculate their earnings. Also, it generated a great deal of discussion and complaints among employees and they in turn complained to supervisors with little or no satisfaction. As testified by Team Sergeant Hinson: ''It was pretty common that people were complaining about the condition of their stubs.'' (Tr. 293.)

According to Anderson, she was also unhappy with the new pay stubs and had noted her concerns to other corporate officials. However, she asserted that the pay stub changes were cost saving and there was ''not much I could do about it.'' (Tr. 392.) Peviously, payroll processing had been contracted out to Control Data Processing (Control). In late 1987, Globe notified Control that due to ''economic considerations,'' that Globe was ''going to do our payroll processing in-house on our own computer.'' (R. Exh. 15.) Anderson testified that the changes saved Globe $12,000 annually per station.

Hartman learned from members of his security team and other guards that they would be willing to sign a petition protesting the new pay system. Thus, Hartman prepared and circulated such a petition which was signed by 58 employees and mailed it to Anderson. (G.C. Exh. 2.) Hartman's name headed the list which also contained Benoist's signature. Anderson acknowledged receiving the petition in late January or early February 1988. According to Anderson, she filed the petition away in her desk and took no action and did not come across it until August 1988 when she hired her assistant, Mike Moylan. Anderson explained that she tried to educate the employees about the new system but they continued to raise questions. She asserted that as she could not do anything to change the pay stubs, she did not view the petition as important but rather only a rehash of employee complaints. Anderson denied knowledge regarding the sender of the petition and testified that she did not discuss the petition with anyone until after the subject had come up at Hartman's unemployment hearing.

### B. *Discussion and Conclusions*

The General Counsel contends that Hartman and Benoist were terminated because of their concerted activities over matters pertaining to pay and other terms and conditions of employment. It is now settled that where an employer, with knowledge of such concerted activities, takes adverse or disciplinary action against employees because they were so involved, it thereby violates Section 8(a)(1) of the Act. *Meyers Industries*, 268 NLRB 493, 497 (1984), reaffd. 281 NLRB 882 (1986); *Joseph De Rario, DMD, P.A.*, 283 NLRB 592 (1987); *Micro-Chart Co.*, 283 NLRB 1064 (1987).

The Respondent, on the other hand, contends, inter alia, that the General Counsel failed to establish that the Respondent had knowledge of the alleged concerted activities, as required under *Meyers*, or that there is a nexus between the activities and the disputed terminations, as required under the Board's *Wright Line*[4] test. The parties are in agreement that a *Wright Line* analysis is in order.

Under *Wright Line*, the General Counsel has the initial burden of establishing a prima facie case by showing enough evidence to warrant an inference that the protected conduct was a motivating factor in the employer's disputed action. Once accomplished, the burden shifts to the employer to demonstrate that it would have taken the same action notwithstanding the protected activities. (251 NLRB at 1089.) Here, for reasons noted below, I find that the General Counsel has satisfied its *Wright Line* burden by showing that the terminations were based in whole or in part on protected conduct. Noting that the burden then shifts to the Respondent, I find that the Respondent demonstrated that it would have taken the same action as to Benoist but not as to Hartman, even in the absence of the protected conduct. The factors supporting the General Counsel's prima facie case are noted as follows:

The record disclosed that Hartman and to a lesser degree Benoist, had long been involved in efforts to reform the Respondent's pay policy and other terms and conditions of employment. Thus, the record disclosed that Hartman, back in mid-1985, sought and obtained the assistance of the U.S. Department of Labor, Wage and Hour Division, to correct the Respondent's method of computing overtime premium pay. The Government's investigation covered the period from May 1984 to May 1986 and resulted in, inter alia, the Respondent reimbursing its employees over $30,000. (R. Exh. 14.) In December 1985, Hartman prepared, signed, and circulated a document or petition among security guard members complaining about the Company's failure to reduce changes in policies and procedure to writing thereby creating conflicts regarding certain job responsibilities. (G.C. Exh. 3.) Benoist, and most, if not all members of Hartman's team signed that petition which was to the attention of Lieutenant B. M. Martin.

Further, in September 1987, Hartman persuaded Anderson to correct certain payroll errors. After a meeting which lasted approximately 1-1/2 hours, Anderson acknowledged to Hartman that the Company made errors in calculating weighted overtime. Hartman testified credibly that he informed Anderson that it was better to work out this adjustment with her ''instead of going *back* [emphasis added] to the Federal wage and hour.''[5] (Tr. 215.) The meeting led Anderson to notify

[4] *Wright Line*, 251 NLRB 1083, 1089 (1980).

[5] In assessing *Hartman's* credibility, it is noted that his testimony, in certain critical areas is corroborated not only by documents and other General Counsel witnesses, but also by the Respondent's witnesses, *Anderson* and *Captain Bone*. As such, I find that *Hartman's* testimony, in large part, is internally consistent with the total record. It is noted, for example, that *Anderson* provided almost full corroboration of *Hartman's* account of the September 1987

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all security employees by memorandum dated September 10, 1987, that ''on your next pay check you may note a small adjustment in your pay . . . to correct errors since May 1986.'' (R. Exh. 4.)

Still further, in January 1988, Hartman composed, circulated, and solicited employee signatures on a petition setting forth employee opposition to the new pay system which the Company had instituted earlier that month. Hartman's signature heads the list of 58 employee signatories, including Benoist. (G.C. Exh. 2.) Anderson admits receiving and perusing the document in late January or early February 1988. Clearly, in these circumstances, under *Meyers*, the signatories to the petition were engaged in protected concerted activities. Additionally, the record disclosed, that Hartman discussed this and other matters outlined above related to pay and other terms and conditions of employment with employees and that they encouraged him to take action to address their complaints. Hartman, testified credibly and with corroboration that with regard to some of these matters, he and other employees, sometimes concertedly, pressed their immediate supervisors for answers without any satisfaction. (Tr. 168–172, 83, 87–93, 293.) On the state of this record, I find that Hartman and Benoist, to a lesser degree, engaged in protected concerted activities within the meaning of *Meyers*. I turn next to the other elements of the General Counsel's prima facie case.

According to the Respondent, the record is devoid of any animus relative to the alleged protected concerted conduct. The Respondent also argues that the employee petition protesting the new pay system (G.C. Exh. 2) relied on so heavily by the General Counsel, involved activity back in January 1988, approximately 6 to 7 months prior to the disputed discharges and that such timing tends to militate against any causal connection. First, as to ''animus,'' I find, contrary to the Respondent, that the record supports this critical element. For reasons noted above, I found that the employee petition constituted protected concerted activity. It is undisputed that Captain Bone was upset on learning of the petition, to wit, that employees deemed it necessary to bypass him in the chain of command in going directly to Anderson with their written protest. This was highlighted when Bivins was interviewed and Captain Bone (in the presence of Anderson) interrogated him on this subject. Ostensibly, that interview was to investigate Bivins' conduct regarding the captain's phone mail. Clearly, Captain Bone interrogated Bivins because he was strongly opposed to the petition. It is noted that Bivins told Captain Bone that he opposed the need for such a petition and was not a signatory and was retained; whereas, Hartman and Benoist were both terminated.

The record also revealed a number of other factors supporting the finding that Respondent displayed animus vis-a-vis protected concerted conduct. Thus, Hartman testified, without contradiction, that back in early 1986, he was summoned to Captain Bone's office, where, in the presence of Captain Bone and Lieutenant Martin, he (Hartman) was warned by District Manager Collins that the Company would not tolerate certain of his activities. At that time, Collins displayed for Hartman a memo (G.C. Exh. 3) which the latter typed and signed along with most team members (including Benoist), asking the Company to reform certain policies and procedures. (Tr. 163–164.) It is noted that the essence of the remarks ascribed to Collins on that occasion was confirmed by Captain Bone. (Tr. 369.) Significantly, Collins did not criticize Hartman's performance as a security officer and noted that up until the time of the memo, that Hartman had done an excellent job.

Hartman, was not yet finished acting in concert with other employees notwithstanding the words of warning by Collins. Thus, as described previously, Hartman was responsible for the employee petition protesting the new pay system in January 1988. I find it highly unlikely and reject Anderson's assertion that she paid no attention to the petition; that it was unimportant; and, that she merely left it on her desk for approximately the next 6 months. In this regard, it is noted that the petition, which was signed by 58 employees protesting the new pay system made reference, inter alia, to the Department of Labor's previous involvement in correcting errors in pay. As noted previously, on that occasion, the Company reimbursed its security staff over $30,000. Hartman was responsible for the petition in January 1988 as well as inviting the earlier investigation by the labor department. In resolving another pay dispute Hartman told Anderson in September 1987, that it was better to work it out between themselves than for him to go back to the labor department. Such conduct was hardly lost on Anderson or other company officials. Thus, at a meeting on June 24, 1988, with Anderson and her supervisor, Norm Stevens, Hartman was interviewed and cooperated in the investigation of another member of the staff; however, Hartman also brought up issues that he raised in the past such as the Company's disciplinary policy. (Tr. 406–407,440–442.) As testified by Anderson, Stevens told Hartman: ''There is no doubt in our mind that [you are] a good employee, however, you need to channel your efforts in more positive direction.'' (Tr. 406–407.)

In the context of the entire record, I am persuaded that the Company's efforts to exhort Hartman to ''channel'' his energies in other directions is akin to using code words to dissuade him from engaging in protected conduct. In this regard, it is also noted as testified by Hartman, with corroboration from Captain Bone, that when the captain informed him that he was terminated, he also told Hartman that he was a valuable employee and had he ''channeled'' his activities in a different direction, ''[I (Hartman)] could have been a Lieutenant by now.'' (Tr. 178; 337–340.) The phone mail intrusions had only come to Captain Bone's attention 2 days earlier. As Hartman's work ethic and overall job performance was uniformly assessed by management from the good to excellent range, I am persuaded that the Respondent seized upon the phone mail incident as a pretext; the real reason having more to do with Respondent's failure to get Hartman to ''channel'' his energies away from protected concerted activities.

As noted above, the Respondent also argues that the ''timing'' of its action militates against any causal connection with the disputed protected conduct. Hartman and Benoist were terminated approximately 6 to 7 months after the employee petition opposing the new pay system was submitted to Anderson. Clearly, the hiatus factor here is not so dra-

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meeting. In essence, her testimony differed in one respect: *Anderson* testified that *Hartman* told her that he did not want to go to Wage and Hour rather than going ''back'' to that agency. (Tr. 434.) As for *Anderson*, I found her in key areas to be conclusionary, vague, unresponsive, and elusive. In these circumstances and on the basis of demeanor observations, I credit *Hartman* where the testimony is in conflict.

matic or compelling to preclude any nexus being drawn. Compare, *TLT-Babcock, Inc*., 293 NLRB 163 (1989), where layoffs were found to be discriminatory although the protected activities occurred approximately 2 years and 10 months earlier. Clearly here, the Respondent did not consider the disputed activities to be over in January or February when Anderson received the petition. This is evident by Stevens' remarks to Hartman as late as June 24 about channeling his energies in other directions and repeated by Captain Bone to Hartman in August. Still further, it is noted that the same petition which Anderson asserted to be of no importance, served as a basis of Captain Bone to interrogate Bivins even after Hartman was discharged.

Having found that the General Counsel has made a prima facie showing that the Respondent was at least, in part, unlawfully motivated by discharging Hartman and Benoist, I turn now to consider whether the Respondent met its *Wright Line* burden by demonstrating that it would have taken the same action notwithstanding the protected conduct.

At the outset, I find that the Respondent had legitimate reasons to challenge the conduct of employees who wrongfully and knowingly intercepted Captain Bone's private messages. Its right to do so is further justified, where, as here, the employees involved are security officers at a nuclear generating station, and their conduct amounts to a security breach. Indeed, if this case did not involve other considerations, I would understand and accept an employer's refusal to countenance such improper conduct. However, on the state of this record, I am persuaded, and I find, that Respondent's reaction to the misconduct was influenced by other factors and in Hartman's case, he would not have been terminated but for his protected activities.

The most telling factor militating against the Respondent's efforts to meet its *Wright Line* burden is that it failed to adequately address the issue of disparate treatment. In this regard, the record disclosed that both Bivin and Hartman are good and respected officers; they had each wrongfully intercepted Captain Bone's private messages; both were either contrite or, in Hartman's case, he admittedly stated that he used bad judgement; Bivins was merely suspended without pay for 3 days and Hartman was terminated. Thus, the question is why the disparate treatment. Captain Bone first suggested that Bivins had a better attitude and expressed remorse but when pressed to amplify these observations, he admitted: ''In actuality, there was no difference . . . .'' (Tr. 372.) On the other hand, the General Counsel contends, the record supports, and I find that the material differences between them all relate to Hartman's protected activities.

As described in detail previously, Hartman had long been involved in protected activities. These activities included the petition he composed and circulated in early 1988. On the other hand, it is not contended nor does the record show that Bivins ever joined or supported such activities. Bivins, unlike Hartman and Benoist, was not a signatory to the 1988 petition. In fact, Bivins told Captain Bone that such petitions did not do any good and was not a good idea. Captain Bone for his part was admittedly upset that employees did not come to him before taking the petition to Anderson. Thus, it is likely that Captain Bone and even Anderson's assessment of Bivins' attitude was influenced by his (Bivins') stated opposition to the petition.

It is noted, that Bivins, at the interview, first maintained that he did not do anything wrong and in fact told his supervisor, Sergeant Hinson, that he had tapped into Captain Bone's private line. Hinson denied that he had any such conversation. The Company assertedly believed Hinson.[6] That being so, I am at a loss to understand the Respondent's generous assessment regarding Bivins' attitude, while at the same time, it did not accord Hartman similar attributes. For example, according to Respondent, it also believed Hinson over Hartman regarding their respective versions over the phone mail incident; however, in Hartman's case unlike Bivins', the Respondent stressed this point only against the former. Similarly, both Anderson and Captain Bone spoke favorably regarding Bivins' cooperation. Again, this assessment is not supported by the record, unless of course, it was by not signing the employee petition. Thus, it is undisputed, that Bivins did not convey in any manner that he would divulge the names of other employees who had wrongfully used phone mail. On the other hand, Hartman actually offered to do this if the Company provided an employee roster. Hartman offered to go down the roster and place a mark next to the names of those employees who had intercepted the captain's phone mail. The Respondent's reason for not picking up on Hartman's offer does not have the ring of candor and is hardly persuasive. According to Respondent, Hartman did not delineate whether his knowledge was direct or predicated on hearsay. In any event, if anything, it appears that Hartman was more willing to cooperate than Bivins.

Hartman had never been suspended. The Respondent conceded that he was an excellent security officer. (Tr 370–371.) In early 1988, Captain Bone gave Hartman a letter commending him for outstanding attendance. There, Captain Bone also noted: ''As in past years, you efforts are an exceptional example of interest, dedication and an example for the entire force.'' (G.C. Exh. 7.) Still later, in Hartman's annual evaluation, it is noted, inter alia, that his quality of work is of high degree''; that he is ''conscientious about his job''; and, that ''[he] works well with supervision and his peers.'' (G.C. Exh. 6b.)

In view of the foregoing and the entire state of this record, noting particularly that the Respondent treated Hartman, an excellent employee, disparately, by discharging him and not Bivins, I find that the Respondent has not satisfied its *Wright Line* burden by showing that it would have taken the same action absent his protected activities. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act, as alleged.

With regard to Benoist, I am persuaded that the Respondent would have terminated her notwithstanding her protected conduct. As noted previously, I have accepted the notion that employees who knowingly intercept private messages meant only for management engage in improper conduct. Here, the misconduct is compounded because it involves a security breach by a security officer at a nuclear generating station. Benoist, unlike Hartman or Bivins, never acknowledged that

[6] I credit *Bivins* over *Hinson*. It is noted, inter alia, that *Bivins* was employed by the Respondent at the time he testified and as such, he testified against his self-interest, a matter not to be treated lightly. As for *Hinson*, I found that he was at times implausible and lacked candor. For example, *Hinson* asserted that he first learned of the petition at the instant hearing; however, *Hinson* attended Hartman's unemployment hearing where the subject of the petition was given prominent attention. In view of the foregoing, the entire record, and demeanor considerations, I credit *Bivins*.

her actions were wrong. Thus, while she apologized to Captain Bone, at the same time she continued to maintain that she did nothing wrong. Benoist characterized her eavesdropping as ''recreational,'' which relieved her from the boredom and tedium of the job. (Tr. 123–124.) As such, Benoist's attitude hardly inspires confidence that she would refrain from similar conduct in the future. In contrast, Hartman acknowledged that he used bad judgement. Also, unlike Hartman, the record is devoid of any evidence reflecting on Benoist's positive attributes as a security officer. Rather, the record disclosed that earlier in the same year in which Benoist was terminated, she had been suspended for 3 days without pay for failing to complete her patrol.

The General Counsel noted that in discharging Benoist, the Respondent referred to a conspiracy with Hartman. The record is clear however that, in context, the comment related solely to the phone mail. Thus, admittedly, Benoist told Hartman to access the captain's private code because the message pertained to him (Hartman). Further, it is noted that Benoist's termination report states that Benoist ''conspired with Hartman in the misuse of the phone mail.'' (R. Exh. 2.)

On the total state of the record, noting particularly Benoist's cavalier attitude regarding the seriousness of the misconduct involved with nothing in this record to dispel the notion that she might repeat such misconduct, I am persuaded that the Respondent has met its *Wright Line* burden and would have terminated her absent her protected conduct. Accordingly, I shall recommend that the allegation pertaining to Benoist be dismissed.

## CONCLUSIONS OF LAW

1. The Respondent, Globe Security Systems, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discharging Steven Hartman because he engaged in protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

3. The unfair labor practice found in paragraph 2 above affects commerce within the meaning of Section 2(6) and (7) of the Act.

4. The discharge of Joyce H. Benoist did not violate the Act.

## THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As I have found that the Respondent unlawfully terminated Steven Hartman for engaging in protected concerted activities in violation of Section 8(a)(1) of the Act, I shall recommend that the Respondent be ordered to offer Hartman immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without preiudice to his seniority and other privileges, and to make him whole for any loss of earnings as a result of the unlawful action against him with backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall also recommend that any reference to Hartman's unlawful discharge be expunged from his employment record.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

## ORDER

The Respondent, Globe Security Systems, Inc., Cornelius, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in concerted activity protected by the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Steven Hartman immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge in the manner set forth in the remedy section of this decision.

(b) Expunge from its files any reference to the unlawful discharge of Steven Hartman and advise him in writing that this has been done, and that evidence of the unlawful discharge will not be used as a basis for future personnel action concerning him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, pesonnel records and reports, and all of the records necessary to analyze backpay under the terms of this Order.

(d) Post at its North Carolina McGuire Nuclear Station copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint allegation that Joyce H. Benoist was unlawfully discharged be dismissed.

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[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge any of you for engaging in concerted activities for your mutual aid and protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Steven Hartman immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his former seniority or any other rights and privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL expunge from our files any reference to his disciplinary discharge and WE WILL notify him that this has been done and that evidence of his unlawful discharge will not be used as a basis for future personnel actions against him.

GLOBE SECURITY SYSTEMS, INC.